(4) (4)

Nos. 09-547, 09-533

Supreme Court, U.S.
FILED
DEC 4 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

CROPLIFE AMERICA, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AQUATIC ECOSYSTEM RESTORATION FOUNDATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are trade groups representing a broad range of agricultural, forestry, and development interests. *Amici*'s members use pesticides to prevent or remedy disease, infestation, and other harmful invasions of pests that would otherwise threaten food, water, forests, and other resources on which the public depends. Their application of pesticides is strictly regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

The Sixth Circuit's decision in this case rejected an Environmental Protection Agency (EPA) rule, which had provided that pesticide applications made in accordance with FIFRA do not constitute a discharge of a pollutant requiring a Clean Water Act (CWA) permit. CropLife Pet. App. 1a–25a.

This decision will affect hundreds of thousands of people and entities, including small businesses and individual landowners. EPA has stated that this decision threatens

> significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to, over, or near waters of the United States without NPDES [National Pollutant Discharge Elimination System] per-

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[1] Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, neither party nor party counsel made a contribution intended to fund the preparation or submission of the brief, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for all parties have received timely notice of intent to file this brief and have consented to the filing, and the letters of consent have been filed with the clerk.

> mits and now, as a result of this Court's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act.

EPA Mot. for Stay at 1, CropLife Pet. App. 106a–107a. This will affect a wide variety of organizations that, like *amici*'s members, use pesticides to control dangerous pests, such as "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a.

Thus, the panel's decision will burden *amici*'s operations by subjecting an array of activities to broad and uncertain CWA liability. Imposition of CWA permit requirements unsuited to those activities will impede *amici's* ability to respond quickly and effectively to harmful pests, risking significant losses and imposing crippling costs. *Amici's* operations are essential to our Nation's supply of food, water, and shelter, and they are vitally affected by this case. Accordingly, *amici* believe that the Court will benefit from their views in evaluating the importance of the legal question presented by petitioner.

BACKGROUND AND SUMMARY OF ARGUMENT

A central objective of the Clean Water Act is that "the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). In furtherance of this goal, the CWA forbids the unpermitted "discharge of any pollutant" from a point source. *Id.* § 1311(a). Accordingly, before anyone may lawfully discharge a pollutant, it is necessary to apply for and receive a permit under the "National

pollutant discharge *elimination* system," *id.* § 1342 (emphasis added).

The Sixth Circuit held that all biological pesticides and those chemical pesticides which result in "waste" in the water are pollutants under the statute and, when discharged to water from a point source, require an NPDES permit. The court held that the statute unambiguously precludes a contrary interpretation, and thus that there is no difference between farmers, landowners, and public health officials who treat crops, forests, and swamps to avoid dangerous infestations, and those who discharge industrial wastes into a river—under the Act, both types of discharges are to be eliminated. This result ignores common sense, does violence to the statute, and is contrary to this Court's direction in *Chevron* that deference is owed to the agency's interpretation of a statute it administers.

The provisions of the Clean Water Act relied on by the court of appeals do not mention pesticides. The only reference in the Act to pesticides is at 33 U.S.C. § 1254*(l)*, which authorizes EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the effects of pesticides in water. Congress did not view pesticides categorically as harmful substances, requiring elimination. Just three days after passing the CWA, Congress enacted major revisions to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which *balances* the risks and benefits of applying pesticides. 7 U.S.C. § 136 *et seq.* FIFRA forbids any distribution of pesticides unless they are registered, *id.* § 136a(a), and ensures that they are not used in a way that "cause[s] unreasonable adverse effects on the environment." *Id.* § 136a(d)(1)(B). "Environment" is specifically defined to include "water." *Id.* § 136(j).

During the Clean Water Act debates, Senator Dole stated: "[p]esticides provide substantial *benefits* to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3760 (emphasis added). He went on to note that pesticides would continue to be beneficial: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future." *Id.* And he noted that they would be regulated under FIFRA: "In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." *Id.*

Nonetheless, the Sixth Circuit held that pesticides were unambiguously "pollutants" within the meaning of the CWA's § 301, which forbids the unpermitted "discharge of any pollutant" from a point source. 33 U.S.C. § 1311(a). The Sixth Circuit suggested that it was compelled to reach this result because "pollutant" is defined by the CWA to include "chemical wastes" and "biological materials." *Id.* § 1362(6). But in its myopic focus on the list of words defining "pollutant," the court lost sight of the word itself: a pollutant is a substance "that renders the air, soil, water, or other natural resource harmful." *Random House Webster's Unabridged Dictionary* 1498 (2d ed. 2000). In doing so, it gave the term "pollutant" "no effect whatever." *Solid Waste Agency of N. Cook County* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). Worse, the court prohibited EPA from giving any effect to the term "pollutant." EPA's view that the term "pollutant" cabined otherwise expansive terms such as "biological materials" was both reasonable and faithful to the statute. *Id.* That every fisherman's worm is

"biological material" does not make every cast of the rod without a CWA permit punishable by a $37,500 fine. 33 U.S.C. § 1319(b), (c); 40 C.F.R. § 19.4.

If left unaddressed, the Sixth Circuit's errors will have stark consequences. The NPDES permitting program currently encompasses approximately half a million permits; EPA has estimated that the decision below will expand the NPDES program to 5.6 million new pesticide applications *per year*. EPA Mot. for Stay at 11, CropLife Pet. App. 115a. And unlike most expansions of the NPDES program, which impose only economic burdens, this expansion threatens the ability of public health officials, forest owners, and farmers to prevent or remedy infestations that endanger the public welfare.

This case consolidated challenges from eleven circuits and settles the application of the Clean Water Act to pesticide discharges to the water. There will be no future split among the courts of appeals on the issue presented in this case. The Court should grant certiorari in this case to correct the dramatic misapplication of *Chevron* and to relieve the substantial burdens that this decision has placed upon farmers, landowners, and public health officials.

ARGUMENT

The Petition in this case effectively shows why this Court's review is warranted. Amici's purpose here is both to show that the implications of the decision below are sweeping and harmful and that those harms are not justified by any fair interpretation of the Clean Water Act. The Sixth Circuit ignored this Court's direction on the appropriate deference to an agency's interpretation of statutes which it administers, and this Court's decisions interpreting the Clean Water Act. Furthermore, this decision

leaves our Nation seriously vulnerable to destructive and dangerous infestations.

I. THE DECISION BELOW FAILS TO APPLY APPROPRIATE *CHEVRON* DEFERENCE.

a. It is axiomatic that the deference due an agency in interpreting a statute which it administers is governed by *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). *Chevron* provides that a court must first determine if Congress has "addressed the precise question at issue," and, if not, defer to the agency interpretation so long as it is a "permissible construction of the statute." *Id.* at 843. This Court recently emphasized in a Clean Water Act case that the precise question at issue must be carefully formulated, and set out the question as the beginning of its analysis: "Do EPA performance standards and § 306(e), apply to discharges of fill material." *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2469 (2009). When a court decides whether Congress has addressed the precise question, it should employ "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

In this case, at the level of greatest precision, the question at issue is how, if at all, the permit provisions of the CWA apply to the discharge to the water of chemical and biological pesticides for the purpose of controlling pests in or over the water.

The Sixth Circuit failed to ask this question or any question close to it. In fact pesticides are not addressed in the provisions of the statute on which the Sixth Circuit relied. Indeed, the statute's only mention of "pesticides" comes at 33 U.S.C. § 1254(*l*), which directs EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the kind and extent of effects on health and

welfare from pesticides in water. *Id.* § 1254(*l*)(1). This provision is clearly at odds with the conclusion that pesticides are to be addressed under the NPDES system. Under the Act it is the federal EPA, not the States, which has responsibility for establishing the terms on which permits are to be initially issued and then made more stringent over time. *Id.* § 1342(a). If Congress intended pesticides to be subject to NPDES permits, as industrial waste materials are, it would not have directed that the analysis of pesticides be issued to the States.

The pesticide study provision also authorizes the Administrator of EPA to "conduct studies and investigations of methods to control the release of pesticides into the environment" and "submit reports . . . with his recommendations for any necessary legislation." *Id.* § 1254(*l*)(2). If pesticides were already slated for elimination under the NPDES program, such a provision would not be necessary. The language of this provision is consistent with what the legislative history makes plain: pesticides are discharged to the water primarily for beneficial purposes and hence are fundamentally different from industrial waste.

Within days after passing the CWA, Congress enacted major revisions to FIFRA, which explicitly regulates pesticides, and authorized them to be used where they will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(d)(1)(B). In other words, pesticides can and should be put to beneficial uses both on land and water but, as with all economic poisons, must be handled with care and judgment in order to prevent harm. In the context of addressing the Clean Water Act, Senator Dole made plain that, given the beneficial present and future uses of pesticides, they were to be regulated under

FIFRA: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." S. Rep. No. 92-414, at 92, *as reprinted in* 1972 U.S.C.C.A.N. at 3760.

Congress did not explicitly address the precise question at issue and identify pesticides discharged to the water as "pollutants" subject to permitting. Moreover, the Sixth Circuit's decision is inconsistent not only with the one section of the Clean Water Act explicitly directed to the regulation of pesticides, but also with the understanding of Congress that contemporaneously enacted FIFRA to address pesticide issues directly. In fact, the evidence in the statute and its legislative history clearly show that Congress did not consider pesticides to be classed as "pollutants."

The Sixth Circuit's analysis flies in the face of this Court's *in pari materia* canon, which dictates that statutes addressing the same subject matter generally should be read "'as if they were one law.'" *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). The Sixth Circuit refused to consider the bearing of FIFRA on the question before it, declining to "analyze the relationship between the Clean Water Act and the FIFRA." CropLife Pet. App. 25a. Had it done so, it would have found that Congress recognized that a balance had to be struck between the benefits gained from careful use of pesticides on land and water and the risks of indiscriminate use of economic poisons. FIFRA sets out how that balance is to be struck; the Clean Water Act does not.

b. At the next level of generality, the question at issue may be phrased as whether a substance whose discharge to the water presents both benefits to human health and the environment, and certain risks, falls within the definition of "pollutant" under 33 U.S.C. § 1362(6). On this question, the Sixth Circuit reached an answer that is not found in the text of statute, and defies common sense. Nevertheless, the court found its reading to be supported unambiguously by the statute.

The decision below asserts that "[t]he term 'biological materials' cannot be read to exclude biological pesticides or their residuals." CropLife Pet. App. 19a. Presumably, the Court meant that "biological pesticides" are literally "biological materials." This, of course, is true. But by focusing only on the words in the definition of pollutant, 33 U.S.C. § 1362(6), and not on the term "pollutant" itself, the court below failed to follow this Court's instruction that the meaning of the defined term itself must be given some effect. *SWANCC*, 531 U.S. at 172; *Rapanos* v. *United States*, 547 U.S. 715, 734 (plurality opinion), 779 (Kennedy, J., concurring) (2006). This Court's instruction in *SWANCC* and *Rapanos* is particularly germane in this case. The Seventh Circuit, reversed by this Court in *SWANCC*, made the same error with respect to the provision of the Clean Water Act which defines "navigable waters," 33 U.S.C. § 1362(7), failing to give any weight to the term "navigable." The court below, however, has committed an error with more profound consequences. The *SWANCC* court merely gave deference to the Army Corps' decision to give no effect to the defined term; the court here has affirmatively prohibited EPA from giving any effect to the term

"pollutant," despite the deference that EPA is owed in this context.

The *Random House Webster's Unabridged Dictionary*, *supra*, at 1498, offers two definitions of pollutant: "1. something that pollutes.[2] 2. any substance . . . that renders the air, soil, water, or other natural resource harmful or unsuitable for a specific purpose." Both definitions connote a substance that is harmful or deleterious. Thus, to give the term "pollutant" effect, EPA properly provided that a pesticide is only a pollutant if it is not used according to the terms prescribed by FIFRA.

EPA's interpretation makes far more sense of the definition of pollutant. While some of the substances listed in 33 U.S.C. § 1362(6) are generally considered harmful, others would be harmful or beneficial depending on the circumstances. This is clearly the case with heat and biological materials. Thermal discharges are specifically recognized in the statute as being either beneficial or deleterious depending upon the circumstances. The statute authorizes EPA to conduct comprehensive studies regarding "minimizing adverse effects and maximizing beneficial effects of thermal discharges." 33 U.S.C. § 1254(t).

What is true for heat is true for biological materials as well. Many biological materials are plainly pollutants, and many are not. Congress surely did not intend, for instance, to require discharge permits for the introduction of hatchery-raised fish to navigable waters or to eliminate the introduction of such fish by 1985. In fact, other statutes promote the stocking of hatchery-raised fish for sport and

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[2] *Random House Webster's Unabridged Dictionary*'s first definition of "pollute," *supra*, at 1498, is "to make foul or unclean, esp. with harmful chemical or waste products."

recreation. 16 U.S.C. § 760 *et seq.* And, the CWA itself contains a provision directing the U.S. Fish and Wildlife Service, in cooperation with state agencies, to establish and implement a fisheries resource program for Lake Champlain, "including dedicating a level of hatchery production . . . at or above the level that existed immediately preceding the date of enactment." 33 U.S.C. § 1270 note. The most prominent example of the Act's focus on the elimination of substances *when they are harmful* is the national policy that the discharge of "toxic pollutants *in toxic amounts*" be prohibited. *Id.* § 1251(a)(3) (emphasis added). Congress clearly recognized that even "toxics" are truly pollutants only when they cause harm.

The answer to the question of how Congress addressed whether or not substances that may be beneficial or harmful, depending upon the circumstances, are to be classified makes perfect sense. When the substance is harmful, it is a pollutant; when it is beneficial, it is not. As we have shown, it is in FIFRA and not the Clean Water Act that Congress struck the balance that permits the beneficial use of pesticides but prohibits their harmful use.[3]

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[3] The primacy of FIFRA in governing the use of pesticides is reinforced by the terms of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, which Congress passed in 1980 and which governs the reporting and clean up of discharges of hazardous substances into the environment. Under CERCLA, Congress explicitly treated pesticides in a manner unlike any other hazardous substance. The statute requires reporting of "any release (other than a federally permitted release)" of a hazardous substance. *Id.* § 9603(a). But the section does not apply to the application of a pesticide product registered under FIFRA. *Id.* § 9603(e). The statute also imposes liability for

If the Sixth Circuit had framed the question at issue carefully, it would have found that, although the statute does not explicitly address whether pesticides are pollutants, it does recognize that "pollutants" are limited to harmful or deleterious substances.

Under *Chevron*, EPA's interpretation of the statutory scheme was both reasonable and fully consistent with the direction provided in the Clean Water Act, FIFRA, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The discharge of pesticides into the water for the beneficial purposes of preventing or remediating an infestation is not the discharge of a pollutant when it is done pursuant to FIFRA, the statute that directs EPA to set the parameters for the use of pesticides. The agency's interpretation was entitled to deference.

II. THE DECISION BELOW THREATENS THE NATION'S ABILITY TO PREVENT INFESTATIONS THAT ENDANGER THE PUBLIC WELFARE.

At a stroke, the Sixth Circuit's decision has made all pesticide applications to the waters of the United States illegal. Petitioners and their members rely on

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remedial costs resulting from the release of a hazardous substance. *Id.* § 9607(a). But it provides no recovery of such costs resulting from the application of a pesticide product registered under FIFRA. *Id.* § 9607(i). By dealing with pesticides under a provision that is separate from that addressed to "federally permitted releases," Congress made clear that pesticides were not regulated by permit programs such as that in the CWA but instead are regulated by the terms of FIFRA. This statutory exception to CERCLA is fully consistent with the treatment afforded pesticides in the EPA rule vacated by the Sixth Circuit in this case.

these applications to safeguard the nation's crops, forests, and housing stock from dangerous infestations. The Sixth Circuit's decision will put these vital resources in grave danger.

As EPA has stated, the decision will forbid "5.6 million pesticide applications annually . . . to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels." EPA Mot. for Stay at 11, CropLife Pet. App. 115a. The decision will prevent action by "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a. The decision will make each such application of pesticide unlawful. *Id.* at 1–2, 106a–107a.

EPA has suggested that these dramatic adverse consequences may be mitigated by the development of general permits for application of pesticide to water, but such claims may be wishful thinking and at a minimum warrant healthy skepticism.

First, as EPA details, the process of developing and implementing a general permit is complicated, time-consuming, and unpredictable. EPA Mot. for Stay at 11–15, CropLife Pet. App. 115a–119a. This is by design—in implementing its statutory duty, EPA must seek and respond to input from States, other federal agencies, and the public at large. Both the process and the results may not afford pesticide applicators the certainty that they need. More fundamentally, it is unclear how EPA can possibly reconcile Congress's objective to eventually eliminate pollutants with the necessity of generally permitting pesticide application.

Second, under the Sixth Circuit's decision, EPA simply does not have the authority to authorize pesticide application in the vast majority of the country. As EPA acknowledges, a general permit "will provide permit coverage only in the four States in which EPA is the permitting authority, plus the United States' territories, tribal lands and federal facilities." EPA Mot. for Stay at 14–15, CropLife Pet. App. 118a. Thus, there is no easy fix for the problem created by the decision below. Even States that wish to follow suit may face additional procedural hurdles. And there is no certainty that States always have the appropriate incentives to address the pesticide application problem—pesticides prevent *national* outbreaks of disease and crop infestation that transcend state boundaries, which is why they are regulated nationally under FIFRA.

Finally, general permits do not account for the full flexibility that pesticide applicators require to combat infestations that suddenly threaten crops due to unanticipated confluences of aggravating factors. Take the example of aerial application businesses. Although there are approximately 1,600 such businesses in the United States, the average number of aircraft per business is only 2.2, and each such business typically has between three and five employees. These aerial applicators are often asked to make an application for mosquito abatement or for a crop just minutes before the application is needed—making it impossible to file CWA paperwork, including a notice of intent, in advance. And under general permits, the applicator could be required to do follow-up water monitoring to make sure the application had no negative effects. This requirement would force aerial applicators to trespass on private property, to which they have no legitimate access. In

contrast, such applicators are trained to handle pesticides in compliance with FIFRA, which strictly regulates such applications but does not require anticipating applications well in advance of their necessity and does not require follow up visits.

This simple example illustrates vividly the immediate and acute nature of the harms caused by the Sixth Circuit's decision. Similar examples abound. Thus, cranberry growers whose crop grows in the waters of the United States obviously will be directly harmed by this new regulatory regime that Congress never enacted. The bottom line point is straightforward, many livelihoods that are represented by the associations participating as *amici* in this case are now in serious jeopardy and only review by this Court can protect them.

In sum, the decision below threatens pesticide applicators with unpredictable and potentially fatal harm, and thus places our nation's forest, housing, and agricultural resources in danger.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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